

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

**IN THE MATTER OF
ANTHONY MORABITO,
GRIEVANT,**

v

**DEPARTMENT OF HEALTH AND
SOCIAL SERVICES,
AGENCY.**

DOCKET NO. 97-12-108

DECISION AND ORDER

BEFORE, Susan L. Parker, Esquire, Chairperson, Robert Burns, Vice-Chairperson, Dallas Green, John Schmutz, Esquire, and John W. Pitts, members constituting a lawful quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* §5908(a)

APPEARANCES

For the Grievant:

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For the Agency:

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AND NOW, after consideration of the briefs and other submissions of the parties together with the testimony and exhibits received during the evidentiary hearing, the Board hereby grants the motion to dismiss the grievance appeal of Anthony Morabito for the reasons hereinafter set forth.

BACKGROUND

The Merit Employee Relations Board has previously considered this grievance appeal and the motion to dismiss it. By Order dated June 11, 1998, the Board preliminarily denied the Department's motion to dismiss without prejudice. The basis for such preliminary denial was the Board's need for further information concerning the application of the principle of "administrative

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estoppel" which was raised by Mr. Morabito for the first time before the Board at the oral argument held to address the Department's motion to dismiss on May 21, 1998.

The Board's interlocutory Order provided for the parties to file briefs on the application of the principle of administrative estoppel and the Board encouraged the parties to develop a stipulation concerning the facts and circumstances which gave rise to the Grievant's contention that the Department is estopped from placing another individual in the position which he seeks and is further estopped from seeking the dismissal of this appeal. The parties filed briefs as requested and later, on November 13, 1998, filed with the Board a limited stipulation of fact. The matter was thereafter scheduled for an evidentiary hearing concerning the nature of the positions of Radiation Control Specialist and Environmental Health Specialist III and the nature of the "understanding" between Mr. Morabito and Mr. Steiman which was followed by Mr. Morabito's resignation from the position of Radiation Control Specialist and his acceptance of a contract with the Department as a consultant.

As the Board observed in its initial Order, this appeal traces its roots to a grievance filed by Mr. Morabito on March 5, 1992. At that time, Mr. Morabito was dissatisfied with the manner in which his duties had evolved and increased while his pay grade remained constant. His grievance sought to have the position he was filling as a Radiation Control Specialist upgraded or, in the alternative, to have the duties of the position reduced to a level commensurate with a paygrade 10. On March 11, 1992, the Step 1 hearing officer indicated he could offer no resolution of the grievance. The Deputy Director of Health Systems Protection, Mr. Richard Steiman, reviewed the grievance at the Step 2 level on March 12, 1992.

In moving to dismiss this appeal the Department contended, among other things, that the grievance was resolved at the meeting with Mr. Steiman at the Step 2 level when the Grievant agreed to resign his position in return for a consulting contract with the Department whereby he was to perform fundamentally the same duties he was performing as a State employee. Mr. Steiman and Mr. Morabito understood that the position would be easier to reclassify if it were vacant. The purported "agreement" or "deal" between the Department and Mr. Morabito was never memorialized in writing as a written Step 2 decision. However, Mr. Morabito did resign the position of Radiation Control

Specialist on April 28, 1992, and thereafter received a consulting contract after submitting a letter of resignation to Richard M. Steiman. In his resignation letter Mr. Morabito stated, in pertinent part:

"I am writing this letter to inform you of my resignation as a Radiation Control Specialist in your section. I will be leaving my State merit position as of April 30, 1992. I regret the fact that I am unable to formally give you a two-week notice. I have been anticipating the finalization of my grievance since before April 15, 1992. My contract with the Division of Public Health, which has resulted from my grievance will be beginning May 1, 1992. During the term of my contract I hope to assist you in the reclassification of my previous position.

At the conclusion of my contract, I am looking forward to possibly continuing my Health Physics career, in a much greater capacity with your organization."

The Department, in its motion seeking dismissal of the appeal, also contended that Mr. Morabito is not a State employee and has no standing to bring an appeal to the Board; that he did not pursue his grievance to Step 3 until, at the earliest, August 1993, thus the grievance is nullified by his failure to timely pursue it; and finally, that the Board is stripped of jurisdiction to hear the appeal because the grievance was resolved at Step 2.

At Step 4 of the grievance process, this matter was considered in a two-day hearing (April 14, 1996 and July 19, 1996) and was ultimately denied by a written Step 4 decision dated August 2, 1996. The Grievant and his attorney deny ever having received the written Step 4 decision until November 15, 1996 when, at counsel's request, a partial copy of the written decision was forwarded by facsimile transmission to him. The Grievant then sought to appeal from the Step 4 denial of his grievance by letter from his counsel which was received at the Merit Employee Relations Board on December 9, 1996.

Grievant takes the position that he was awaiting a written decision from the Step 2 hearing and never received one so, slightly over a year later, on March 31, 1993, he mailed a written request to then Secretary Carmen Nazario asking for a resolution of the grievance at Step 3.

Grievant's counsel, in a letter dated August 5, 1993 to Secretary Carmen R. Nazario, asserts that the Grievant was apparently informed that the only way the position he occupied could be upgraded would be for him to perform the duties of the position on a contract basis while the reclassification occurred. The letter complained that there had been no reclassification of the position

and sought the assistance of the Secretary in moving the grievance along so that, if the position was not to be reclassified, the work being done would be revised to match the job description.

Mr. Morabito takes the position that he can move forward with a grievance to the next step in the grievance process at any time he chooses without limit in the absence of a required written decision from the appropriate authority. Mr. Morabito also asserts that the fact that he is no longer an employee in the classified service does not prevent him from pursuing a grievance which was duly instituted while he was so employed.

At the initial oral argument before the Board on the motion to dismiss, the Department disputed the fact that a "deal" or "agreement" was made with the Grievant at Step 2 of the grievance process to place the Grievant in a reclassified or upgraded position. The Agency further contended that, even if such a deal was made, it was outside the authority of the Agency to make and that the Department is not bound by any such agreement to reclassify the position and rehire the Grievant in that position. The Grievant contended that such a deal was made, that the Grievant relied upon it, and that the State is bound by the principle of administrative estoppel and must honor its agreement and that the Board should place the Grievant in the position promised to him and award him back pay from the time the position was filled.

STIPULATION OF FACT

The stipulation of fact filed by the parties on November 13, 1998, confirms that Mr. Morabito resigned the Radiation Control Specialist position and thereafter had a consulting contract between May 1, 1992 and June 30, 1992. The position from which he resigned remained vacant after his resignation. The position of Environmental Health Specialist III was approved by the State Personnel Director on June 23, 1993. It was this latter position for which Mr. Morabito was interviewed and for which he was not selected.

In the stipulation of fact, the parties acknowledged that they were still unable to agree on all aspects of what was resolved at the Step 2 grievance hearing. From the stipulation, it is apparent that at the second step in the grievance process of the original grievance, Mr. Steiman, the Deputy Director of Health Systems Protection in the Division of Public Health, and the Grievant reached an

understanding that Mr. Morabito would resign his position to be employed as a contract employee with the Division of Public Health. The Grievant indicated that he wished to work with Mr. Steiman on the reclassification of the position from which he resigned. It is clear that Mr. Morabito labored under an apparent expectation that he would apply for and be selected to fill the position once it was reclassified. It was not clear from the stipulation of the parties that such selection was guaranteed to or promised to Mr. Morabito.

EVIDENTIARY HEARING

On March 4, 1999, an evidentiary hearing was held before all of the members of the Board to clarify the factual situation left unresolved by the parties' stipulation. Both Anthony Morabito and Richard Steiman were sworn and testified concerning the nature of the position held by Mr. Morabito; the duties he performed as well as the process for the creation of the Environmental Health Specialist III position, and the interview and selection process used to fill the position of Environmental Health Specialist III. Mr. Morabito and Mr. Steiman both testified about their unsuccessful attempts to have the position of Radiation Control Specialist reclassified. Mr. Morabito testified that his 1992 grievance was to have his position reclassified or to have his job duties changed to reflect his paygrade 10 compensation.

Consistent with the stipulation of the parties, Mr. Steiman and Mr. Morabito testified that Mr. Morabito resigned from State employment in the position of Radiation Control Specialist by letter of April 28, 1992 and thereafter accepted employment by the Division of Public Health working as a contract employee.

According to the testimony and consistent with the stipulation, the position of Radiation Control Specialist from which Mr. Morabito resigned was not in fact reclassified; rather a new position of Environmental Health Specialist III was created and the Radiation Control Specialist position previously occupied by Mr. Morabito was never filled. Ultimately, Mr. Morabito was one of the applicants for the "new" Environmental Health Specialist III position and, although he was qualified for and was interviewed for the newly created position, it was awarded to someone else. There is no dispute that Mr. Morabito did not file a separate grievance after his non-selection for the

Environmental Health Specialist III position. The State introduced exhibits consisting of the posting for the position, the certification list for the position and the State employment application of the successful candidate.

As the Board noted in its prior Order, this case is based on Mr. Morabito's belief that he did not get what he believed he bargained for from his initial grievance concerning the position of Radiation Control Specialist. Mr. Morabito in his testimony told the Board that his March 1992 grievance was an attempt to either have the position he occupied reclassified or to have the duties of the position reduced to a level he deemed commensurate with the paygrade for the position. Subsequently, a new position was created and he did not get it.

In his letter filing the appeal with the Board, Mr. Morabito's counsel states that the nature of the act complained of is:

"Failure of agency to follow Merit Rules applicable to the recruitment and application policies, regarding an Environmental Health Specialist III position dealing with radiation requirements and duties."

In the same appeal letter, Grievant's counsel alleges the following violation of the Merit Rules:

"Failure to follow posting and advertising requirements, including the giving of the radiation position to a person not then qualified to perform the duties, as well as failure to properly consider the qualifications of Grievant, and discriminating against Grievant on the basis of non-merit factors."

The Department takes the position that the grievance by Mr. Morabito seeking the reclassification or a change in the duties of the position was resolved at Step 2 by the Grievant's resignation from the position and his acceptance of contract employment with the expectation that the position he was vacating would be reclassified and he would apply for it. The Department further asserts that Mr. Morabito is attempting to work a metamorphosis of the original grievance concerning the Radiation Control Specialist position because he was not selected to fill the Environmental Health Specialist III position.

PRINCIPLES OF ESTOPPEL

The parties have briefed for the Board the application of the principle of promissory or administrative or equitable estoppel to their respective versions of the events concerning the

resolution of Mr. Morabito's original grievance at Step 2. Mr. Morabito asserts that he should be placed in the position of Environmental Health Specialist III and that the Agency should be estopped not only from complaining of any delay by Grievant in processing the grievance after Step 2, but also from selecting another purportedly less qualified applicant for the position, or otherwise avoiding the terms agreed upon between Mr. Steiman and Mr. Morabito.

Both Mr. Steiman and the Grievant testified about their recollections of the agreement at Step 2 of the 1992 grievance process. Their testimony is not necessarily inconsistent. Both agreed that it would be easier to have a new position created if Mr. Morabito's position was vacant. Both agree that Mr. Morabito resigned to take a consulting job performing most of the same duties he had been performing in the position of Radiation Control Specialist and that Mr. Steiman and the Department sought to have, and eventually were successful in having, a new position created. The new position was classified as an Environmental Health Specialist III position which, according to the testimony of Mr. Steiman, is a somewhat "generic" classification which was made more specific by the addition of a special note that the successful applicant would have radiation control responsibilities. The position also had additional responsibilities beyond the duties that Mr. Morabito had been performing. Mr. Morabito had an expectation that, because of his training and experience as a Radiation Control Specialist, he would in all likelihood be selected for the new position unless, as he had been told by Mr. Steiman, a more qualified applicant materialized.

From the testimony of Mr. Morabito and Mr. Steiman, it is clear that the position was not unequivocally promised to Mr. Morabito, but that both Mr. Morabito and Mr. Steiman felt that, because of Mr. Morabito's background, it was likely that he would be the successful applicant for any newly-created position. There is some indication in the testimony that it was promised that Mr. Morabito's training and experience in the position of Radiation Control Specialist would be given consideration in the selection process for the new position. The testimony of Mr. Steiman concerning the interview process and the ultimate selection of another individual was that the other individual was, on the whole, more qualified for the new position than was Mr. Morabito even though her radiation control experience might not have been as extensive as was Mr. Morabito's.

FINDINGS AND CONCLUSIONS

The Board finds that it is questionable whether any "promise" was made to Mr. Morabito by Mr. Steiman in the first instance. However, even if Mr. Steiman did strike a bargain with Mr. Morabito that Mr. Morabito (1) would resign the position of Radiation Control Specialist so as to facilitate the upgrading of the position, (2) would be given a consulting contract in the interim, and (3) would likely be placed into any upgraded position, the Board finds that the principles of promissory or equitable or administrative estoppel should not be applied in this case. The Board specifically finds and concludes that, to the extent a promise was made by Mr. Steiman, it was only a promise to work to create an upgraded position for which Mr. Morabito would, as an applicant, receive fair consideration based upon his experience in radiation control. Any such promise was fulfilled.

Estoppel may lie against a State agency where a party, by conduct or words, intentionally or unintentionally leads another in reliance on such conduct to change his position to his detriment. *Blackwell v. Board of Pension Trustees*, Del. Super., C.A. 96A-12-002 HDR (Mem.Op. Ridgely P.J. (September 19, 1997, aff'd Del. Supr. Ct., No 445, 1997, (Order, Veasy C.J., March 4, 1998)). The elements of an estoppel claim set out in the case of *Keating v. Board of Education of the Apoquinimink School District*, Del. Ch., C.A. No. 12589, Jacobs, V.C. (Nov. 3, 1993)(Mem.Op.). have been adopted by President Judge Ridgely of the Superior Court in the Blackwell case, *supra*, as follows: The plaintiff bears the burden of demonstrating, by clear and convincing evidence, (1) that the defendant made a promise, (2) that it was a reasonable expectation of the defendant to induce the plaintiff to act or forbear, (3) that the plaintiff actually relied on the promise and acted to his detriment, and (4) that the promise is binding and must be enforced to avoid manifest injustice.

The parties agree in their stipulation that there was some difficulty in having Mr. Morabito's position as a Radiation Control Specialist reclassified as long as the position was filled. The parties also agree that in order to facilitate the reclassification of the position, Mr. Morabito resigned and was rehired into fundamentally the same job on a contractual basis. The position from which he resigned was, however, not technically "reclassified," rather, it was never filled and a new position was created. The new position was that of Environmental Health Specialist III and it was approved by

the State Personnel Director on June 23, 1993. Mr. Morabito interviewed for the Environmental Health Specialist III position and was not selected. He did not timely file a written grievance after his non-selection.

Mr. Morabito was apparently qualified for the new position of Environmental Health Specialist III as demonstrated by his being interviewed for the position. He was originally hired as a Radiation Control Specialist and even though his actual duties may have evolved beyond the original position and paygrade, he has not established a reasonable basis for viewing him as an incumbent in the position of Environmental Health Specialist III. The job descriptions for the two positions are significantly different and the testimony of Mr. Steiman supports the conclusion that the newly created position encompassed more responsibility than Mr. Morabito's previous position. Mr. Morabito made application for the second position and the interview committee selected another applicant for the position. Under the circumstances, it is not reasonable to view Mr. Morabito as having a claim or entitlement in equity or otherwise to the new position. He was certainly entitled to apply for and to receive consideration for the new position. He was not automatically entitled to fill the position. Furthermore, if he wished to bring a grievance regarding his non-selection for the new position, he could have, and should have, timely done so, and should have included any claims based on his belief that the successful applicant was not qualified. However, he did not do so and the Board cannot now entertain his appeal for non-selection as Environmental Health Specialist III.

In the view of the Board, this is not an appropriate case for the application of estoppel principles either for the purpose of preventing a motion to dismiss for untimeliness or for the proposition that Mr. Morabito has some equitable claim on the position of Environmental Health Specialist III. Mr. Morabito seeks to pursue what is essentially a second grievance as a metamorphosis of or an addendum to his original grievance which was concluded at Step 2, albeit without a written decision. Mr. Morabito was entitled to a written decision on his grievance after the Step 2 hearing. His remedy if he did not receive one in a timely manner was, at the time this grievance was considered, to take the appeal to Step 3 within a reasonable time period.

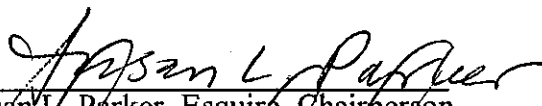
The nature of Mr. Morabito's original 1992 grievance is somewhat unclear. However, to the extent it can be reviewed as a request for a critical reclassification, the Board notes that the Delaware

General Assembly has provided that critical reclassification determinations are not within its jurisdiction. See, 71 *Del. Laws* c. 354. [Epilogue to Budget Bill].

Even if Mr. Morabito's 1992 grievance is viewed as something other than an attempted critical reclassification grievance, his complaint, that an upgraded position was not being created, is moot. A new position was in fact created, he was qualified for it and interviewed for it. He was not selected as the most qualified candidate and he has, in the unanimous opinion of the Board, not established by a preponderance of the evidence that the position was not properly posted or that it was not properly filled by a qualified candidate.

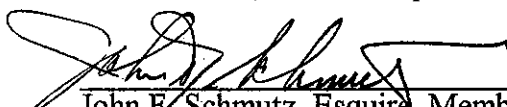
The Board finds that, by waiting until August 1993 to bring to the attention of the Secretary at Step 3 the non-issuance of the written decision at Step 2, the Grievant did not timely pursue his grievance of March 5, 1992. Mr. Morabito's only timely filed grievance was resolved at Step 2 as evidenced by his letter of resignation and by the eventual creation of the new position. That grievance is moot. Mr. Morabito does not have a pending, timely filed grievance concerning the filling of the position of Environmental Health Specialist III. Based on the discussion herein above, and for the reasons stated in the decision of the Step 4 hearing, his appeal to the MERB is dismissed.

IT IS SO ORDERED this 24th day of March, 1999.


Susan L. Parker, Esquire, Chairperson


Robert Burns, Vice-Chairperson


Dallas Green, Member


John F. Schmutz, Esquire, Member


John W. Pitts, Member

APPEAL RIGHTS

29 Del. C. § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: March 29, 1999 *JS*

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